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ShopKo Stores Operating Co., LLC and
12 SVS Trucking LLC

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 ShopKo Stores Operating Co., LLC and
16 SVS Trucking, LLC,
17 Plaintiffs,
18 vs.
19 Balboa Capital Corporation,
20 Defendant.

Case No. 16-cv-00099 JLS (KESx)

AMENDED COMPLAINT FOR:

(1) TORTIOUS FRAUD AND INTENTIONAL DECEIT (CAL. CIV. CODE § 1709 ET SEQ.);

(2) ACTUAL FRAUD (CAL. CIV. CODE § 1572 ET SEQ.);

(3) NEGLIGENT MISREPRESENTATION (CAL. CIV. CODE § 1572 ET SEQ.);

(4-16) BREACH OF CONTRACT;

(17) BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING; AND

(18) VIOLATION OF CALIFORNIA BUS. & PROF. CODE § 17200 ET SEQ.

[DEMAND FOR JURY TRIAL]

1 For their amended complaint, Plaintiffs ShopKo Stores Operating Co., LLC
2 (“ShopKo Stores”) and SVS Trucking, LLC (“SVS Trucking”) (collectively,
3 “ShopKo”) hereby complain and allege against Defendant Balboa Capital
4 Corporation (“Balboa”) as follows:

5 **I. NATURE OF THE ACTION**

6 1. This is an action based upon: (i) tortious fraud and intentional deceit
7 (Cal. Civ. Code § 1709 *et seq.*); (ii) actual fraud (Cal. Civ. Code § 1572 *et seq.*);
8 (iii) negligent misrepresentation (Cal. Civ. Code § 1572 *et seq.*); (iv) breach of
9 contract; (v) breach of the covenant of good faith and fair dealing; and (vi)
10 deceptive business practices under California’s Unfair Competition Law, Cal. Bus.
11 & Prof. Code § 17200, *et seq.*, against defendant Balboa. Shopko seeks
12 compensatory damages, punitive damages, restitution, and injunctive relief to stop
13 defendant’s deceptive business practices.

14 **II. THE PARTIES**

15 2. Plaintiff ShopKo Stores is a Delaware Limited Liability Company that
16 maintains its principal place of business in Wisconsin and has as its sole member,
17 ShopKo Holding, Co., which is a Wisconsin Limited Liability Company with a
18 principal place of business in Wisconsin, who has as its sole member Specialty
19 Retail Shops Holding Corp., a Delaware corporation whose principal place of
20 business is in Wisconsin. Therefore, ShopKo Stores is not a citizen of California.
21 Plaintiff SVS Trucking is a Minnesota Limited Liability Company that maintains
22 its principal place of business in Wisconsin and has as its sole member ShopKo
23 Stores Operating Co., LLC, which is a Delaware Limited Liability Company that
24 maintains its principal place of business in Wisconsin and has as its sole member,
25 ShopKo Holding, Co., which is a Wisconsin Limited Liability Company with a
26 principal place of business in Wisconsin, who has as its sole member Specialty
27 Retail Shops Holding Corp., a Delaware corporation whose principal place of
28 business is in Wisconsin. Therefore, SVS Trucking is not a citizen of California.

1 3. On information and belief, Defendant Balboa is a California
2 corporation that maintains its principal place of business at 2010 Main Street, Suite
3 1100, Irvine, California.

4 **III. JURISDICTION AND VENUE**

5 4. This is a Complaint for damages, injunction, and other appropriate
6 relief stemming from Defendant Balboa's deceptive business practices. In this
7 action, ShopKo asserts violations of California's Unfair Competition Law, Cal.
8 Bus. & Prof. Code § 17200, *et seq.*, California Civil Code § 1572 *et seq.*, California
9 Civil Code § 1709, and common law breach of contract and breach of the implied
10 covenant of good faith and fair dealing.

11 5. This Court has diversity jurisdiction over this action under 28 U.S.C.
12 § 1332, because: (i) Plaintiff ShopKo Stores is a Delaware Limited Liability
13 Company with its principal place of business in Wisconsin and therefore not a
14 citizen of California and Plaintiff SVS Trucking is a Minnesota Limited Liability
15 Company with its principal place of business in Wisconsin and therefore not a
16 citizen of California; (ii) on information and belief, Defendant Balboa is a
17 California Corporation with its principal place of business in California; and (iii)
18 the amount in controversy is greater than \$75,000.

19 6. Venue is proper in this Court pursuant to the forum selection clause in
20 the lease agreements at issue, which requires actions relating to the leases be
21 brought in the courts of Orange County, California. Additionally, venue is proper
22 in this Court pursuant to 28 U.S.C. § 1392(b), as a substantial part of the events or
23 omissions giving rise to the claims pled herein occurred in the Central District of
24 California and Balboa resides within the Central District of California.

25 **IV. FACTS AND BACKGROUND**

26 7. ShopKo Stores is a retailer, operating more than 330 stores in small to
27 mid-sized cities throughout the Central, Western and Pacific Northwestern regions
28 of the United States. ShopKo Stores provides quality name-brand merchandise,

1 pharmacy and optical services. ShopKo Stores also operates ShopKo Hometown
2 stores to meet the need of smaller communities throughout the regions it serves.

3 8. In connection with its need to finance its acquisition of certain capital
4 equipment, ShopKo entered into discussions with Balboa regarding Balboa's
5 equipment leasing program. Following such discussions, and based on
6 representations made by Balboa, ShopKo Stores entered into thirteen (11) capital
7 leases with Balboa, each under similar terms: Lease numbers 171984-000, 001¹
8 002, 003, 004, 005, 006, 007, 009, 010, 011. ShopKo Stores's wholly-owned
9 subsidiary, SVS Trucking, likewise entered into two (2) capital leases with Balboa
10 each under similar terms: Lease Numbers 211267-000, and 211267-001.

11 9. For eight (8) of the leases (000, 001, 002, 005, 006, 009, 211267-000,
12 and 211267-001), ShopKo and Balboa agreed that ShopKo will make a total of 12
13 quarterly payments over the course of a three-year term, after which, for a nominal
14 payment of approximately \$1, ShopKo would own the particular capital equipment
15 it leased.

16 10. The five (5) remaining leases (003, 004, 007, 010, and 011) are similar
17 to the eight (8) leases described above except that ShopKo and Balboa agreed that
18 ShopKo would make a total of 20 quarterly payments over the course of a five-year
19 term, after which, for a nominal payment of approximately \$1, ShopKo would own
20 the particular capital equipment it leased.

21 11. For all 13 leases, each quarterly payment was to be made through
22 Balboa's withdrawal of the expressly scheduled payment amounts directly from
23 ShopKo's bank account.

24 12. For 11 of the leases, almost immediately after executing the lease,
25 Balboa assigned its rights and interests in the lease to Pacific Western Bank,
26 Susquehanna Bank, or Bank of Birmingham. Of the remaining two leases, one
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28 ¹ Hereinafter all three-digit lease numbers refer to leases prefixed with "171984-"

1 (211267-000) was assigned to Susquehanna Bank, and the other (211267-001) was
2 assigned to Pacific Western Bank approximately two months later.

3 13. When each lease was assigned, Balboa sent a letter to ShopKo giving
4 ShopKo a notice of the assignment. These letters were generally dated the same
5 date as the lease schedule for that lease or very shortly thereafter.

6 14. In most of these letters, Balboa listed the exact terms of the quarterly
7 payments required under the lease. For three-year leases (000, 001, 002, 005,
8 211267-000, and 211267-001), Balboa expressly represented that there would be 11
9 consecutive quarterly payments followed by one final quarterly payment. For five-
10 year leases (003, 004, and 007), Balboa expressly represented that there would be
11 19 consecutive quarterly payments followed by one final quarterly payment.

12 15. Within a few weeks after the execution of each lease, ShopKo made an
13 initial deposit under the lease. Two to five weeks later – and after the assignment
14 of those leases that were assigned by Balboa to a third party – Balboa withdrew
15 from ShopKo’s bank account an amount approximately equal to the first quarterly
16 payment scheduled under each of the 13 leases. The amount withdrawn by Balboa
17 was approximately 89/90th of the amount of the authorized quarterly payment
18 under the lease.

19 16. The first lease, for example, was Lease 000. This lease schedule was
20 executed on June 25, 2012, and provides that ShopKo Stores was to make 12
21 quarterly payments of \$129,565.78, with a deposit of \$43,188.59 to be applied to
22 the last quarterly rental payment.

23 17. The next day, Balboa assigned Lease 000 to Pacific Western Bank and
24 gave notice of this assignment in a letter signed by both Balboa and ShopKo Stores.
25 As stated in the lease schedule, the letter stated that ShopKo Stores is obligated to
26 make 12 payments under the lease: “Eleven (11) consecutive quarterly payments of
27 \$129,565.78 and 1 final quarterly payment of \$86,377, commencing on September
28 29, 2012 through and including the payment due on June 29, 2015.” The letter

1 directs that all payments under the newly assigned lease are to be made to Pacific
2 Western Bank.

3 18. Despite the clear terms of the lease schedule and the assignment letter,
4 on August 20, 2012, about two months after the lease was assigned, Balboa made
5 an unscheduled and unauthorized withdrawal of \$128,126.15 from ShopKo's bank
6 account. The amount Balboa withdrew totaled approximately 89/90th of the first
7 quarterly payment due under the lease, leading ShopKo to reasonably believe that
8 the withdrawal constituted the first quarterly payment under the lease schedule.

9 19. The actual first quarterly payment under Lease 000 was withdrawn on
10 October 2, 2012, followed by the 11 additional quarterly withdrawals scheduled
11 under the lease.

12 20. It was only after all 12 scheduled payments were withdrawn that
13 ShopKo became aware of the extra, unauthorized thirteenth withdrawal Balboa
14 made on August 20, 2012, which masqueraded as a quarterly scheduled payment.

15 21. After discovering that Balboa made an unauthorized withdrawal in
16 connection with lease 000, ShopKo discovered that Balboa made unauthorized
17 withdrawals for each of the other 12 capital leases. This included the leases that
18 have yet to expire: 003, 004, 007, 009, 010, 011, 211267-000, and 211267-001.

19 22. On information and belief, the manner in which Balboa withdrew the
20 "extra" payment was part of a scheme by Balboa to defraud ShopKo. By Balboa
21 withdrawing an amount that was approximately 89/90th of the quarterly payment
22 authorized by the lease and making the withdrawal near the first quarter of each
23 lease, Balboa deceived ShopKo into believing the withdrawal was the authorized
24 first quarterly payment. As a result of the scheme, Balboa was able to disguise the
25 unauthorized withdrawal from ShopKo for years. It was not until an additional
26 payment was withdrawn from ShopKo's account that ShopKo learned of Balboa's
27 illicit scheme.

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1 23. ShopKo did in fact believe the first withdrawal under each lease was
2 the first quarterly payment, and not an extra payment outside of, and in addition to,
3 the 12 or 20 quarterly payments authorized under each lease.

4 24. Balboa's conduct has had serious financial impact on ShopKo. Balboa
5 has withdrawn extra initial payments under each lease in the amounts of:

- 6 • Lease 171984-000: \$128,126.15 on 8/20/12;
- 7 • Lease 171984-001: \$39,483.21 on 9/6/12;
- 8 • Lease 171984-002: \$144,818.60 on 9/12/12;
- 9 • Lease 171984-003: \$18,806.72 on 9/17/12;
- 10 • Lease 171984-004: \$21,640.52 on 9/18/12;
- 11 • Lease 171984-005: \$101,836.48 on 9/26/12;
- 12 • Lease 171984-006: \$18,701.09² on 10/24/12;
- 13 • Lease 171984-007: \$39,944.88 on 10/22/12;
- 14 • Lease 171984-009: \$62,414.73 on 5/23/13;
- 15 • Lease 171984-010: \$45,838.19 on 9/25/13;
- 16 • Lease 171984-011: \$12,630.08 on 12/24/13;
- 17 • Lease 211267-000: \$54,853.79 on 4/17/15; and
- 18 • Lease 211267-001: \$86,862.49 on 9/17/15.

19 Each of these withdrawals is approximately 89/90th of the amount of a full
20 quarterly payment under each respective lease, or, in the case of leases 010 and 011,
21 is a full quarterly payment amount.

22 25. Including the full amount owed to ShopKo Stores under Lease 006
23 (\$24,145), Balboa has defrauded ShopKo in excess of \$781,401.46 for withdrawals
24 made in excess of and outside of the agreed lease schedules.

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27 ² ShopKo Stores made a goodwill deposit of \$100,000 that was disproportionately
28 applied to lease 171984-006, with the result that Balboa owes ShopKo Stores more
than the amount of this extra \$18,701.09 withdrawal— Balboa owes ShopKo Stores
\$24,145.62 under this lease.

V. COUNT ONE

Tortious Fraud and Intentional Deceit (Cal. Civ. Code § 1709 et seq.)

26. ShopKo realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 25 above.

27. Balboa presented these leases to ShopKo knowing that the payment terms under each lease were tortiously and intentionally deceitful. Balboa presented to ShopKo lease schedules under each and every capital lease which detailed the deposit amount, the quarterly payment amounts, and the number of quarterly payments due. These schedules also noted that the deposit amount would be applied to the last quarterly payment for each lease. None of these schedules authorized Balboa to make any additional withdrawals under the lease and certainly did not list a payment to Balboa in an amount equal to 89/90th of a quarterly payment or an entire extra quarterly payment under the lease schedule. This is because Balboa intentionally concealed these payments from ShopKo before the leases were executed.

28. Balboa intentionally did not disclose to ShopKo its intentions to withdraw additional payments totaling 89/90th of a quarterly payment or a full quarterly payment under each capital lease. Because they failed to disclose these additional payments, the payment schedules presented by Balboa to ShopKo upon which ShopKo relied were false. Balboa's fraud unilaterally changed the terms of the three-year leases to require 13 quarterly payments instead of 12 and the terms of the five-year leases to require 21 total quarterly payments instead of 20.

29. Upon information and belief, Balboa knowingly concealed its intentions to withdraw these additional payments in order to induce ShopKo into entering the 13 capital leases.

30. ShopKo justifiably relied on Balboa's representations regarding the lease amounts made in the lease schedules when entering into the capital leases. ShopKo relied on Balboa's representation as to the total cost of each lease, the

1 payment terms, and the payment schedules. ShopKo further justifiably relied on
2 Balboa's representations as the payment terms that were listed in Balboa's letters
3 giving notice of the lease assignments were identical to the lease terms. Had
4 ShopKo known that the terms presented by Balboa in each lease and the letters
5 were not accurate and that each lease required an additional payment in the
6 approximate amount of 89/90th of a quarterly payment, ShopKo would not have
7 entered into any of the leases.

8 31. Any position by Balboa that the extra quarterly payments withdrawn
9 from ShopKo's bank account were permissible under the pro-rated rent provision in
10 each lease is without merit, and such an alleged interpretation is both unwarranted
11 and tortiously and intentionally deceitful.

12 32. Balboa's misrepresentations have resulted in ShopKo suffering
13 damages in an amount in excess of \$781,401.46, which is the total amount of
14 money that Balboa improperly withdrew from ShopKo under the 13 leases.

15 VI. COUNT TWO

16 (Actual Fraud, Cal. Civ. Code § 1572 *et seq.*)

17 33. ShopKo realleges and incorporates by reference each and every
18 allegation set forth in paragraphs 1 through 32 above.

19 34. Balboa presented these leases to ShopKo knowing that the payment
20 terms under each lease were fraudulent. Balboa presented to ShopKo lease
21 schedules under each and every capital lease which detailed the deposit amount, the
22 quarterly payment amounts, and the number of quarterly payments due. These
23 schedules also noted that the deposit amount would be applied to the last quarterly
24 payment for each lease. None of these schedules authorized Balboa to make any
25 additional withdrawals under the lease and certainly did not list a payment to
26 Balboa in an amount equal to 89/90th of a quarterly payment or an entire extra
27 quarterly payment under the lease schedule. This is because Balboa intentionally
28 concealed these payments from ShopKo before the leases were executed.

1 35. Balboa intentionally did not disclose to ShopKo its intentions to
2 withdraw additional payments totaling approximately 89/90th of a quarterly
3 payment under each capital lease. Because they failed to disclose these additional
4 payments, the payment schedules presented by Balboa to ShopKo upon which
5 ShopKo relied were false. Balboa's fraud unilaterally changed the terms of the
6 three-year leases to require 13 quarterly payments instead of 12 and the terms of the
7 five-year leases to require 21 total quarterly payments instead of 20.

8 36. Upon information and belief, Balboa knowingly concealed its
9 intentions to withdraw these additional payments in order to induce ShopKo into
10 entering the 13 capital leases. Balboa further concealed its fraudulent scheme as
11 the payment terms that were listed in Balboa's letters giving notice of the lease
12 assignments were identical to the lease terms.

13 37. ShopKo justifiably relied on Balboa's representations regarding the
14 lease amounts made in the lease schedules when entering into the capital leases.
15 ShopKo relied on Balboa's representation as to the total cost of each lease, the
16 payment terms, and the payment schedules. ShopKo further justifiably relied on
17 Balboa's representations as the payment terms that were listed in Balboa's letters
18 giving notice of the lease assignments were identical to the lease terms. Had
19 ShopKo known that the terms presented by Balboa in each lease and the letters
20 were not accurate and that each lease required an additional payment in the
21 approximate amount of 89/90th of a quarterly payment, ShopKo would not have
22 entered into any of the leases.

23 38. Any position by Balboa that the extra quarterly payments withdrawn
24 from ShopKo's bank account were permissible under the pro-rated rent provision in
25 each lease is without merit, and such an alleged interpretation is both unwarranted
26 and fraudulent.

27 39. Balboa's fraudulent scheme has resulted in ShopKo suffering damages
28 in an amount in excess of \$781,401.46, which is the total amount of money that

1 Balboa improperly withdrew from ShopKo under the 13 leases.

2 **VII. COUNT THREE**

3 **(Negligent Misrepresentation, Cal. Civ. Code § 1572 et seq.)**

4 40. ShopKo realleges and incorporates by reference each and every
5 allegation set forth in paragraphs 1 through 39 above.

6 41. Balboa presented to ShopKo lease schedules under each and every
7 capital lease which detailed the deposit amount, the quarterly payment amounts,
8 and the number of quarterly payments due. These schedules also noted that the
9 deposit amount would be applied to the last quarterly payment for each lease. None
10 of these schedules authorized Balboa to make any additional withdrawals under the
11 lease and certainly did not list a payment to Balboa in an amount equal to 89/90th
12 of a quarterly payment or an entire extra quarterly payment. Also, the payment
13 terms that were listed in Balboa's letters giving notice of the lease assignments
14 were identical to the to the lease terms.

15 42. Balboa failed to disclose to ShopKo its intentions to withdraw
16 additional payments totaling 89/90th of a quarterly payment or a full quarterly
17 payment under each capital lease. Because they failed to disclose these additional
18 payments, the payment schedules presented by Balboa to ShopKo upon which
19 ShopKo relied were false. Balboa's actions unilaterally changed the terms of the
20 three-year leases to require 13 quarterly payments instead of 12 and the terms of the
21 five-year leases to require 21 total quarterly payments instead of 20.

22 43. Upon information and belief, Balboa misrepresented its intentions to
23 withdraw these additional payments in order to induce ShopKo into entering the 13
24 capital leases.

25 44. ShopKo relied on Balboa's misrepresentations concerning the
26 withdrawals that would be made under the capital leases in agreeing to enter into
27 the 13 leases. Had ShopKo known that the terms presented by Balboa in each lease
28 and the letters were not accurate and that each lease required an additional payment

1 in the approximate amount of 89/90th of a quarterly payment, ShopKo would not
2 have entered into any of the leases.

3 45. Any position by Balboa that the extra quarterly payments withdrawn
4 from ShopKo's bank account were permissible under the pro-rated rent provision in
5 each lease is without merit, and such an alleged interpretation is both unwarranted
6 and a misrepresentation.

7 46. Balboa's misrepresentations have resulted in ShopKo suffering
8 damages in an amount in excess of \$781,401.46, which is the total amount of
9 money that Balboa improperly withdrew from ShopKo under the 13 leases.

10 **VIII. COUNT FOUR**

11 **(Breach of contract as to Lease No. 171984-000)**

12 47. ShopKo realleges and incorporates by reference each and every
13 allegation set forth in paragraphs 1 through 46 above.

14 48. ShopKo Stores entered into written capital lease number 171984-000
15 with Balboa, with a lease schedule date of June 25, 2012. The lease schedule
16 required 12 quarterly payments of \$129,565.78, with the deposit applied to reduce
17 the last payment amount. A copy of the lease is attached as Exhibit A.

18 49. ShopKo Stores has performed its obligations under this contract, and
19 has made each and every payment due under the lease schedule.

20 50. On August 20, 2012, Balboa breached this contract by withdrawing a
21 "13th" payment of \$128,126.15 from ShopKo's bank account. This amount was
22 not listed in the lease payment schedule agreed to by ShopKo Stores and Balboa.

23 51. Any position by Balboa that the extra quarterly payments withdrawn
24 from ShopKo's bank account were permissible under the pro-rated rent provision in
25 each lease is without merit, and such an alleged interpretation is both unwarranted
26 and a breach of this contract.

27 52. ShopKo Stores has thus suffered damages in excess of \$128,126.15
28 based on this unauthorized withdrawal.

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IX. COUNT FIVE

(Breach of contract as to Lease No. 171984-001)

53. ShopKo realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 52 above.

54. ShopKo Stores entered into written capital lease number 171984-001 with Balboa, with a lease schedule date of July 19, 2012. The lease schedule required 12 quarterly payments of \$39,926.84, with the deposit applied to reduce the last payment amount. A copy of the lease is attached as Exhibit B.

55. ShopKo Stores has performed its obligations under this contract, and has made each and every payment due under the lease schedule.

56. On September 6, 2012, Balboa breached this contract by withdrawing a “13th” payment of \$39,483.21 from ShopKo’s bank account. This amount was not listed in the lease payment schedule agreed to by ShopKo Stores and Balboa.

57. Any position by Balboa that the extra quarterly payments withdrawn from ShopKo’s bank account were permissible under the pro-rated rent provision in each lease is without merit, and such an alleged interpretation is both unwarranted and a breach of this contract.

58. ShopKo Stores has thus suffered damages in excess of \$39,483.21 based on this unauthorized withdrawal.

X. COUNT SIX

(Breach of contract as to Lease No. 171984-002)

59. ShopKo realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 58 above.

60. ShopKo Stores entered into written capital lease number 171984-002 with Balboa, with a lease schedule date of July 30, 2012. The lease schedule required 12 quarterly payments of \$146,445.78, with the deposit applied to reduce the last payment amount. A copy of the lease is attached as Exhibit C.

1 required 12 quarterly payments of \$102,980.70, with the deposit applied to reduce
2 the last payment amount. A copy of the lease is attached as Exhibit F.

3 79. ShopKo Stores has performed its obligations under this contract, and
4 has made each and every payment due under the lease schedule.

5 80. On September 26, 2012, Balboa breached this contract by withdrawing
6 a “13th” payment of \$101,836.48 from ShopKo’s bank account. This amount was
7 not listed in the lease payment schedule agreed to by ShopKo Stores and Balboa.

8 81. Any position by Balboa that the extra quarterly payments withdrawn
9 from ShopKo’s bank account were permissible under the pro-rated rent provision in
10 each lease is without merit, and such an alleged interpretation is both unwarranted
11 and a breach of this contract.

12 82. ShopKo Stores has thus suffered damages in excess of \$101,836.48
13 based on this unauthorized withdrawal.

14 **XIV. COUNT TEN**

15 **(Breach of contract as to Lease No. 171984-006)**

16 83. ShopKo realleges and incorporates by reference each and every
17 allegation set forth in paragraphs 1 through 82 above.

18 84. ShopKo Stores entered into written capital lease number 171984-006
19 with Balboa, with a lease schedule date of September 25, 2012. The lease schedule
20 required 12 quarterly payments of \$18,911.21, with the deposit applied to reduce
21 the last payment amount. A copy of the lease is attached as Exhibit G.

22 85. ShopKo Stores has performed its obligations under this contract, and
23 has made each and every payment due under the lease schedule.

24 86. On October 24, 2012, Balboa breached this contract by withdrawing a
25 “13th” payment of \$18,701.09 from ShopKo’s bank account. This amount was not
26 listed in the lease payment schedule agreed to by ShopKo Stores and Balboa.

27 87. Any position by Balboa that the extra quarterly payments withdrawn
28 from ShopKo’s bank account were permissible under the pro-rated rent provision in

1 each lease is without merit, and such an alleged interpretation is both unwarranted
2 and a breach of this contract.

3 88. ShopKo Stores has suffered damages in excess of \$24,145.62 under
4 this lease based on this unauthorized withdrawal and the disproportionate
5 application of ShopKo Stores's \$100,000 goodwill deposit to this lease.

6 **XV. COUNT ELEVEN**

7 **(Breach of contract as to Lease No. 171984-007)**

8 89. ShopKo realleges and incorporates by reference each and every
9 allegation set forth in paragraphs 1 through 88 above.

10 90. ShopKo Stores entered into written capital lease number 171984-007
11 with Balboa, with a lease schedule date of September 10, 2012. The lease schedule
12 required 20 quarterly payments of \$40,393.70, with the deposit applied to reduce
13 the last payment amount. A copy of the lease is attached as Exhibit H.

14 91. ShopKo Stores has performed its obligations under this contract, and
15 has made each and every payment due under the lease schedule.

16 92. On October 22, 2012, Balboa breached this contract by withdrawing a
17 "21st" payment of \$39,944.88 from ShopKo's bank account. This amount was not
18 listed in the lease payment schedule agreed to by ShopKo Stores and Balboa.

19 93. Any position by Balboa that the extra quarterly payments withdrawn
20 from ShopKo's bank account were permissible under the pro-rated rent provision in
21 each lease is without merit, and such an alleged interpretation is both unwarranted
22 and a breach of this contract.

23 94. ShopKo Stores has thus suffered damages in excess of \$39,944.88
24 based on this unauthorized withdrawal.

25 **XVI. COUNT TWELVE**

26 **(Breach of contract as to Lease No. 171984-009)**

27 95. ShopKo realleges and incorporates by reference each and every
28 allegation set forth in paragraphs 1 through 94 above.

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XIX. COUNT FIFTEEN

(Breach of contract as to Lease No. 211267-000)

113. ShopKo realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 111 above.

114. SVS Trucking entered into written capital lease number 211267-000 with Balboa, with a lease schedule date of January 6, 2015. The lease schedule agreed to by SVS Trucking included 12 quarterly payments of \$55,470.12, with the deposit applied to reduce the last payment amount. A copy of the lease is attached as Exhibit L.

115. SVS Trucking has performed its obligations under this contract, and has made each and every payment due under the lease schedule.

116. On April 17, 2015, Balboa breached this contract by withdrawing a “13th” payment of \$54,853.79 from ShopKo’s bank account. This amount was not listed in the lease payment schedule agreed to by SVS Trucking and Balboa.

117. Any position by Balboa that the extra quarterly payments withdrawn from ShopKo’s bank account were permissible under the pro-rated rent provision in each lease is without merit, and such an alleged interpretation is both unwarranted and a breach of this contract.

118. ShopKo has thus suffered damages in excess of \$54,853.79 based on this unauthorized withdrawal.

XX. COUNT SIXTEEN

(Breach of contract as to Lease No. 211267-001)

119. ShopKo realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 118 above.

120. SVS Trucking entered into written capital lease number 211267-001 with Balboa, with a lease schedule date of June 11, 2015. The lease schedule requires 12 quarterly payments of \$87,828.47, with the deposit applied to reduce the last payment amount. A copy of the lease is attached as Exhibit M.

1 121. SVS Trucking has performed its obligations under this contract, and
2 has made each and every payment due under the lease schedule.

3 122. On September 17, 2015, Balboa breached this contract by withdrawing
4 a “13th” payment of \$86,862.49 from ShopKo’s bank account. This amount was
5 not listed in the lease payment schedule agreed to by SVS Trucking and Balboa.

6 123. Any position by Balboa that the extra quarterly payments withdrawn
7 from ShopKo’s bank account were permissible under the pro-rated rent provision in
8 each lease is without merit, and such an alleged interpretation is both unwarranted
9 and a breach of this contract.

10 124. ShopKo has thus suffered damages in excess of \$86,862.49 based on
11 this unauthorized withdrawal.

12 **XXI. COUNT SEVENTEEN**

13 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

14 125. ShopKo realleges and incorporates by reference each and every
15 allegation set forth in paragraphs 1 through 124 above.

16 126. ShopKo entered into written capital leases numbers 171984-000,
17 171984-001, 171984-002, 171984-003, 171984-004, 171984-005, 171984-006,
18 171984-007, 171984-009, 171984-010, 171984-011, 211267-000, and 211267-001
19 with Balboa, as alleged above.

20 127. On information and belief, Balboa knowingly made misrepresentations
21 to ShopKo regarding the payments that would be withdrawn from ShopKo’s bank
22 account under each of these leases, in violation of the covenant of good faith and
23 fair dealing.

24 128. Balboa withdrew amounts under each lease, as detailed above, that
25 were not in the leases agreed to by Balboa and ShopKo, in violation of the covenant
26 of good faith and fair dealing.

27 129. Any position by Balboa that the extra quarterly payments withdrawn
28 from ShopKo’s bank account were permissible under the pro-rated rent provision in

1 each lease is without merit, and such an alleged interpretation is both unwarranted
2 and represents a violation of the covenant of good faith and fair dealing.

3 130. As a result of Balboa’s bad faith withdrawals, ShopKo has suffered
4 damages in excess of \$781,401.46.

5 **XXII. COUNT EIGHTEEN**

6 **(Violation of California Unfair Competition Law (Cal. Bus. & Prof.**
7 **Code § 17200 et seq.)**

8 131. ShopKo realleges and incorporates by reference each and every
9 allegation set forth in paragraphs 1 through 130 above.

10 132. As detailed above, Balboa has committed business acts and practices
11 that are unlawful, unfair, and fraudulent in violation of California’s Unfair
12 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200.

13 133. Balboa’s business acts and practices are unlawful, unfair, and
14 fraudulent and violate the UCL because Balboa’s acts impair fair and honest
15 competition. By misrepresenting the terms of the leases, Balboa gained an unfair
16 advantage in the marketplace by disguising the true costs of its financial products
17 and misleading customers, including ShopKo.

18 134. Any position by Balboa that the extra quarterly payments withdrawn
19 from ShopKo’s bank account were permissible under the pro-rated rent provision in
20 each lease is without merit, and such an alleged interpretation is both unwarranted
21 and a breach of the UCL.

22 135. As a direct and proximate result of Balboa’s unfair competition in
23 violation of the UCL, Balboa has been unjustly enriched in an amount in excess of
24 \$781,401.46.

25 **XXIII. PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs ShopKo Stores and SVS Trucking pray for
27 judgment against Defendant Balboa, inclusive as follows:

28 1. For compensatory, consequential and incidental damages according to

- 1 proof;
- 2 2. For punitive damages;
- 3 3. For restitution of the amounts obtained by Defendant Balboa as a
- 4 result of its wrongful conduct;
- 5 4. For injunctive relief commanding Defendant Balboa to cease and
- 6 desist its unlawful conduct;
- 7 5. For an award of its reasonable attorneys’ fees; and
- 8 6. For such other and further relief as the Court deems just and proper.

10 Dated: June 29, 2016

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Brian M. Hom
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DEMAND FOR JURY TRIAL

18 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury
19 as to all issues so triable in this action.

22 Dated: June 29, 2016

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